

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JILL DIANE CLAYTON.

CASE NO. C18-0748JLR

Plaintiff,

**ORDER DENYING MOTION TO
EXCLUDE EXPERT
TESTIMONY**

AIR & LIQUID SYSTEMS
CORPORATION,

Defendant.

I. INTRODUCTION

Before the court is Plaintiff Jill Diane Clayton's¹ motion to strike certain expert opinions of Kyle Dotson, Defendant Syd Carpenter Marine Contractor Inc.'s ("Syd Carpenter") expert witness.² (*See* MTE (Dkt. # 115).) Syd Carpenter opposes Plaintiff's

¹ Ms. Clayton is the surviving spouse and the executor of the estate of William Richard Clayton, deceased. (Am. Compl. (Dkt. # 146) ¶ 1.)

² Plaintiff's motion initially sought to exclude opinions offered by both Kyle Dotson and Howard Spielman, Defendant Vigor Shipyards, Inc.'s ("Vigor") expert witness. (See *id.* at 1-2.)

1 motion. (See Resp. (Dkt. # 120).) The court has considered the motion, Syd Carpenter's
2 response, all submissions filed in support of and in opposition to the motion, the relevant
3 portions of the record, and the applicable law. Being fully advised,³ the court DENIES
4 the motion.

5 **II. BACKGROUND**

6 This case involves claims related to asbestos exposures that Ms. Clayton alleges
7 the decedent, Mr. Clayton, experienced while serving aboard the *USS Badger* ("the
8 *Badger*") in the 1970's. (FAC (Dkt. # 146) § III.) Plaintiff asserts that Mr. Clayton was
9 exposed to asbestos on the *Badger* in six ways: (1) through direct work on insulated
10 communications systems; (2) as a bystander to other tradespersons' work on insulated
11 equipment; (3) through direct maintenance and repair of thermal system insulation in his
12 immediate work area; (4) as a bystander to Syd Carpenter's thermal insulation rip-out
13 work at Todd Shipyard; (5) as a bystander while the ship was underway, which disturbed
14 insulation dust and shook it loose; and (6) as a bystander while learning to maintain

15 _____
16 However, on July 5, 2019, the parties notified the court that Vigor had settled (Notice (Dkt.
17 # 119)), and on February 20, 2020, the court dismissed Plaintiff's claims against Vigor with
prejudice (2/20/20 Order (Dkt. # 160)). Accordingly, the court DENIES as MOOT the portion of
Plaintiff's motion seeking to exclude portions of Mr. Spielman's expert witness testimony.

18 ³ Neither party requests oral argument or a formal *Daubert* hearing. (See generally MTE;
19 Resp.); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1991). The parties
20 have fully briefed the issues (*see* MTE; Resp.; Reply (Dkt. # 122)) and submitted evidentiary
materials in support of their respective positions (*see* 1st Aliment Decl. (Dkt. # 118); Babbitt
21 Decl. (Dkt. # 121); 2d Aliment Decl. (Dkt. # 123)). The court, therefore, does not consider oral
argument or an evidentiary hearing to be necessary to its disposition of Plaintiff's motion. *See*
Local Rules W.D. Wash. LCR 7(b)(4) ("Unless ordered by the court, all motions will be decided
22 by the court without oral argument."); (explaining that a district court is not required to hold a
formal *Daubert* hearing "under Supreme Court precedent or [the Ninth Circuit's] own case
law").

1 various systems aboard the ship. (MTE at 2-3 (citing 1st Aliment Decl. ¶ 2, Exs. 3
2 (“8/26/18 Clayton Dep.”), 4 (“Norton Dep.”)).) At the time that the case was filed, Mr.
3 Clayton also testified that he was exposed to asbestos through his father, who was a
4 career naval officer. (1st Aliment Decl. ¶ 2, Ex. 2 (“5/25/18 Clayton Dep.”) at
5 23:23-24:16.) However, no party located a living witness who served with Mr. Clayton’s
6 father in the Navy or military records to explain how Mr. Clayton’s father would have
7 been exposed to asbestos. (See MTE at 5.)

8 Syd Carpenter relies on expert testimony from Mr. Dotson, an industrial hygienist,
9 to calculate Mr. Clayton’s lifetime asbestos exposure. (See generally 1st Aliment Decl.
10 ¶ 2, Ex. 5 (“Dotson Rpt.”).) Syd Carpenter relies on Mr. Dotson’s opinions to support its
11 positions that Mr. Clayton’s exposure aboard the *Badger* was (1) below the Occupational
12 Safety and Health Administration’s (“OSHA”) then-existing permissible exposure limit;
13 and (2) *de minimis* or insignificant. (See generally *id.*) Mr. Dotson opines that “the
14 worst-case hypothetical exposure for Mr. Clayton associated with thermal insulation
15 aboard the . . . *Badger* allegedly associated with Syd Carpenter, if any, would have been
16 less than any asbestos workplace standard in effect at the time.” (*Id.* at 54 (Opinion 1).)
17 He also opines that “Mr. Clayton would have had a certain amount of asbestos exposure
18 simply from living in the natural ambient environment,” and that “[s]uch exposure is not
19 associated with asbestos-related disease.” (*Id.* (Opinion 2).) Finally, he opines that Mr.
20 Clayton’s “worst-case hypothetical exposure” from asbestos associated with Syd
21 Carpenter, if any, “was less than the cumulative exposure that anyone his age might
22 expect to have from living in the ambient environment in major [U.S.] cities” and,

1 “[s]ince there is no measurable risk associated with exposure to the ambient
2 environmental background, there can be no measurable risk associated with this
3 exposure, if any.” (*Id.* (Opinion 3).)

4 To arrive at his opinions, Mr. Carpenter engages in a “retrospective dose
5 assessment” to create a range of hypotheticals, including a “worst-case hypothetical,”
6 intended to “define a level at which there is essentially no way that the exposure of
7 interest would ever exceed.” (*Id.* ¶ 2, Ex. 9 at 811:4-7.) To convert this range to a
8 cumulative or lifetime exposure, Mr. Dotson divides what he determines to be the length
9 of exposure by the average work year.⁴ (*See* MTE at 9.) After establishing what Mr.
10 Dotson considers to be Mr. Clayton’s “cumulative exposure” to asbestos related to Syd
11 Carpenter, Mr. Dotson then compares Mr. Clayton’s “cumulative exposure” to a
12 threshold exposure of “what anyone [Mr. Clayton’s] age might expect to have from living
13 in the natural ambient environment of the United States,” below which Mr. Dotson
14 opines “there is no measurable risk associated with exposure.” (*See* Dotson Rpt. at
15 53-54.) Because Mr. Dotson concludes that (1) Mr. Clayton’s “worst-case hypothetical
16 exposure” to asbestos associated with Syd Carpenter is “less than the cumulative exposure
17 that anyone [Mr. Clayton’s] age might expect to have from living in the ambient
18 environment in major [U.S.] cities,” and (2) “there is no measurable risk associated with
19 exposure to the ambient environmental background,” he also concludes Mr. Clayton
20 //

21
22 ⁴ For example, Mr. Dotson would divide an exposure lasting 20 minutes by 120,000
 minutes or an exposure lasting one hour by 2,000 hours. (*See* MTE at 9.)

suffered no measurable risk due to his exposures to asbestos associated with Syd Carpenter. (*Id.*)

Plaintiff argues that Mr. Dotson's work is scientifically unreliable and lacks sufficient factual foundation and that his opinions should be excluded on that basis. (*See* MTE at 10-12, 15-18.) The court now addresses Plaintiff's motion.

III. ANALYSIS

A. Standards

“Before admitting expert testimony into evidence, the district court must perform a ‘gatekeeping role’ of ensuring that the testimony is both ‘relevant’ and ‘reliable’ under Federal Rule of Evidence 702.”⁵ *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (citing *Daubert*, 509 U.S. at 597). “Relevancy simply requires that ‘the evidence logically advance a material aspect of the party’s case.’” *Id.* (citing *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (citation and internal alterations omitted)). Reliability “requires that the expert’s testimony have ‘a reliable basis in the knowledge and experience of the relevant discipline.’” *Id.* (quoting *Kumho*

11

⁵ Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

1 *Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). The test for reliability “is not the
2 correctness of the expert’s conclusions but the soundness of his methodology,’ and when
3 an expert meets the threshold established by Rule 702, the expert may testify and the fact
4 finder decides how much weight to give that testimony.” *Pyramid Techs., Inc. v.*
5 *Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (quoting *Primiano v. Cook*,
6 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (Apr. 27, 2010)). The reliability analysis
7 is “a malleable one tied to the facts of each case,” and “district courts are vested with
8 ‘broad latitude’ to ‘decide how to test an expert’s reliability’ and ‘whether or not an
9 expert’s relevant testimony is reliable.’” *Murray v. S. Route Mar. SA*, 870 F.3d 915,
10 922-23 (9th Cir. 2017) (quoting *Kumho Tire*, 526 U.S. at 152-53). Although *Daubert*,
11 509 U.S. at 592-94, identifies several factors that may be used for evaluating the
12 reliability of an expert—whether the scientific theory or technique has been tested, peer
13 reviewed, identified as having a particular rate of error, and generally accepted in the
14 scientific community—district courts are not required to consider all (or even any) of
15 these factors, nor are they required to hold a “*Daubert* hearing.” *Barabin*, 740 F.3d at
16 463-64.

17 **B. Reliability**

18 Ms. Clayton argues that attempts to reconstruct an individual’s lifetime dose of
19 asbestos, like the one found in Mr. Dotson’s report, “have been widely criticized as
20 unreliable.”⁶ (MTE at 15.) Although Ms. Clayton cites criticisms of the analytical

21
22

⁶ Plaintiff challenges only the reliability and not the relevancy of Mr. Dotson’s expert testimony. (See Reply at 2-3 (“[Ms. Clayton] expressly acknowledges that *accurate* dose

1 approach Mr. Dotson uses (*see id.* at 15-16 nn. 53-57), the court cannot conclude that Mr.
2 Dotson's methodology lacks "'a reliable basis in the knowledge and experience of the
3 relevant discipline,'" *see Ruvalcaba-Garcia*, 923 F.3d at 1188 (quoting *Kumho Tire Co.*,
4 526 U.S. at 149). Indeed, Mr. Dotson is a certified industrial hygienist with over 30 years
5 of experience (*see* Dotson Rpt. at 1), and as indicated in his report, he relied upon,
6 reviewed, and cited over 200 industrial documents and studies in arriving at his opinion
7 concerning Mr. Clayton's potential exposures to products associated with Syd Carpenter
8 (*see generally id.*). Further, Mr. Dotson cites other credible scientific sources to confirm
9 that the industrial hygiene profession has recognized, since the 1970's, that "standard
10 exposure assessment methodologies" can be used to estimate an individual's cumulative
11 asbestos exposure. (*Id.* at 7 nn.41-42.)

12 Moreover, Ms. Clayton acknowledges that she does not seek to exclude all dose
13 reconstruction testimony (*see* Reply at 2); and indeed, Plaintiff's expert, Timur Durrani,
14 intends to offer his own opinions concerning the level of asbestos exposure Mr. Clayton
15 sustained while working aboard the *Badger* (*see* Babbitt Decl. ¶ 7, Ex. 5 ("Durrani Dep.")
16 at 137:7-24). Specifically, Dr. Durrani testified in his deposition that generalized studies
17 on dose quantification for activities Mr. Clayton allegedly

18 //

19 _____
20 reconstruction may be helpful to the jury in an asbestos case."). The court concludes that
21 because mesothelioma is caused by exposure to respirable asbestos, Mr. Dotson's testimony
22 concerning Mr. Clayton's exposure to asbestos fibers while he worked aboard the *Badger* is
relevant and "will help the trier of fact to understand the evidence or determine a fact in issue."
See Fed. R. Evid. 702(a); *see also Ruvalcaba-Garcia*, 923 F.3d at 1188 (stating that "[r]elevancy
simply requires that the evidence logically advance a material aspect of the party's case")
(internal citation and quotation marks omitted).

1 performed helped him derive his exposure opinions. (*See id.* at 137:7-24.) Nevertheless,
2 Dr. Durrani testified that “dose reconstruction is a difficult model to interpret and rely
3 on” (*id.* at 127:14-25), that he does not typically perform this type of calculation (*see id.*
4 at 130:13-19), and that he would only be comfortable relying on a lifetime dose
5 calculation after a “fair amount” of “work with a colleague who would know what they
6 are doing” (*id.* at 130:13-22). Although Dr. Durrani criticizes Mr. Dotson’s methodology
7 as “difficult” (*id.* at 127:14-25), he does not testify that Mr. Dotson’s method is
8 scientifically unreliable (*see generally id.*).

9 Ms. Clayton does not dispute that over 25 courts have qualified Mr. Dotson as an
10 expert witness when employing the same method Ms. Clayton challenges here. (*See*
11 Resp. at 2; Dotson Rpt. at 78-94;⁷ *see generally* MTE; Reply.) Although Mr. Dotson’s
12 qualification as an expert witness in other trials is not dispositive of the present motion, it
13 provides additional support for the court’s conclusion that Mr. Dotson’s methods meet
14 the Rule 702 threshold of reliability. *See* Fed. R. Evid. 702. Plaintiff’s expert witness,
15 Dr. Durrani, chose a different method by which to calculate Mr. Clayton’s exposures (*see*
16 Durrani Dep. at 137:7-24), and Dr. Durrani is permitted to offer his critique of Mr.
17 Dotson’s method at trial and to testify why his method is superior. These are issues,
18 however, for the jury to weigh. *See Pyramid Techs., Inc.*, 752 F.3d at 814 (stating that
19 “when an expert meets the threshold established by Rule 702, the expert may testify and
20 the fact finder decides how much weight to give that testimony”). In sum, the court

21
22

⁷ The page numbers in this citation are to the electronic numbers generated by the court’s
electronic filing system.

1 concludes that Mr. Dotson’s opinions meets the Rule 702 threshold level of reliability for
2 admission at trial.

3 Plaintiff also asserts that Mr. Dotson’s opinions are not based on the facts in this
4 case. (See MTE at 17-18.) Plaintiff argues that Mr. Dotson “fails to account for all of
5 Mr. Clayton’s work assignments, how long that work took place, and the type of asbestos
6 involved in that work.” (*Id.* at 18.) Although the parties may dispute the factual record
7 and how well Mr. Dotson applies that record to his analysis, Mr. Dotson summarizes Mr.
8 Clayton’s deposition testimony in detail in his report, including Mr. Clayton’s testimony
9 concerning thermal insulation work, insulation loosening from ship vibrations, and the
10 frequency of his alleged exposures. (See Dotson Rpt. at 9-15.) Ms. Clayton may
11 disagree with Mr. Dotson’s characterization of Mr. Clayton’s deposition testimony or
12 argue that Mr. Clayton overemphasized certain passages or failed to adequately consider
13 others, but based on Mr. Dotson’s lengthy recitation of Mr. Clayton’s testimony and Mr.
14 Dotson’s review of myriad other evidentiary materials in this case (*see id.* at 1-2), the
15 court concludes that Mr. Dotson’s opinions are “based on sufficient facts or data” to
16 warrant admission of his opinion testimony at trial. *See* Fed. R. Evid. 702(b).

17 Plaintiff further argues that Mr. Dotson “miscalculates the exposure associated
18 with given work assignments and assumes dust control measures were in place [on the
19 *Badger*] without citation to the evidence in this case.” (MTE at 18.) Again, although the
20 parties may disagree concerning the appropriate exposure value that should be used, Mr.
21 Dotson provides a justification for the value he uses that is grounded in Mr. Clayton’s
22 deposition testimony. (See Resp. at 9 (citing Dotson Rpt. at 46, 50).) Further, Mr.

1 Dotson's report and deposition testimony provide rational bases for his opinion that some
2 asbestos controls were in place aboard the *Badger* and why he did not analyze fiber type
3 in this case. He grounds his opinion that some industrial hygiene controls were in place
4 on the *Badger* during the 1972-73 timeframe "upon the regulatory history of asbestos in
5 the [United States] including the [U.S.] Navy as characterized by the documentation of
6 [U.S.] Navy procedures by the Puget Sound Naval Shipyard and other [U.S.] Navy
7 correspondence and documents." (Dotson Rpt. at 49.) Further, during his deposition,
8 Mr. Dotson explained that he did not analyze fiber size in this case because "to the extent
9 that [Mr. Clayton's] exposure is insignificant on a worst-case hypothetical basis, [fiber
10 size] would not change [his] conclusion." (See Babbit Decl. ¶ 8, Ex. 6 ("Dotson Dep.")
11 at 16:3-17:20.)

12 The parties' expert witnesses disagree about Mr. Clayton's asbestos exposure in
13 this case. These disagreements, however, are typical in a case such as this and do not
14 provide a basis for excluding Mr. Dotson's expert opinion. Instead, the disagreements
15 highlighted in Ms. Clayton's motion represent "fodder for cross-examination" as Ms.
16 Clayton implicitly acknowledges (see MTE at 18)—not a basis for exclusion under Rule
17 702 or *Daubert*. See Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592-94.

18 //

19 //

20 //

21 //

22 //

IV. CONCLUSION

Based on the foregoing analysis, the court DENIES Plaintiff's motion to exclude Mr. Dotson's expert dose reconstruction opinions (Dkt. # 115).

Dated this 13th day of February, 2020.



JAMES L. ROBART
United States District Judge